FILED
AUG 1 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-47

FIBREBOARD PAPER PRODUCTS CORPORATION, ET AL,
Petitioners,

v.

CLARENCE BOREL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

GEORGE A. WELLER
P. O. Box 350
Beaumont, Texas 77704

JOHN G. TUCKER
Beaumont Savings Building
Beaumont, Texas 77701

JOHN PIKE POWERS IV
San Jacinto Building
Beaumont, Texas 77701

GORDON R. PATE
Beaumont Savings Building
Beaumont, Texas 77701

GEORGE E. DUNCAN
Petroleum Building
Beaumont, Texas 77701

W. N. ARNOLD, JR.
Bank of the Southwest Building
Houston, Texas 77002

Counsel for Petitioners

FIDELITY PRINTING COMPANY, HOUSTON

INDEX

	PAGE
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutory Provisions Involved	3
Statement of the Case	4
Importance of the Question	9
There are 28 similar cases pending in other Courts, etc.	
Reasons for Granting the Writ	10
1. The decision below that Borel did not have notice of "asbestosis" conflicts with decisions of Texas Courts, The Fifth Circuit and Supreme Court of the United States holding that Borel had notice as a matter of law of the statutes of Texas	10
2. The failure to submit an interrogatory or form of verdict whereby the jury could pass on the defense of assumption of risk deprived defendants of the right to trial by jury	14
3. The case was submitted on special interrogatories and not on a general verdict, therefor the opinion fails to follow Rule 49a and is in conflict with decisions of the First Circuit and the Fourth Circuit	14
4. The decision below is in conflict with the Tenth Circuit and cases cited in failing to instruct on the defense of balancing of the product's utility against the danger	18
5. The decision below applying the rule of 402A retroactive to 1937 is in conflict with opinions of the Supreme Court of Texas adopting strict liability and is in violation of the Constitution of the State of Texas	19
Conclusion	23
Appendix	**A-1**
Opinion and Judgment of Court of Appeals	**A-3**
Opinion and Judgment of Court of Appeals on Rehearing	**A-53**
Copy of Article 8306, Sec. 20(a), and Article 8306, Sec. 26, Revised Civil Statutes of Texas	**A-65**

Page

Opinion Ct. Civ. App. Tex., Kasch v. Anton, 81 S.W.2d 1097, 1100 ..... A-70

Copy of The Asbestos Worker, October, 1956 ..... A-81

Copy of The Asbestos Worker, July, 1957 ..... A-85

Copy of The Asbestos Worker, November, 1961 ..... A-89

Copy of The Asbestos Worker, April, 1957 ..... A-91

Affidavit re other cases involving claims for damages resulting from asbestos exposure A-93

List of other cases pending A-96

Opinion, Sup. Ct. Tex., Pittsburg Coca-Cola Bottling Works v. Ponder (1969), 443 S.W.2d 546, 548 ..... A-97

Opinion, Sup. Ct. Tex., Howle v. Camp Amon Car'er (Tex. 1971), 470 S.W.2d 629 ..... A-111

Opinion, Sup. Ct. Tex., McKisson v. Sales Affiliates, Inc. (Tex. 1967), 416 S.W.2d 787 ..... A-117

CITATIONS

Statutes

Revised Civil Statutes of Texas, Workmen's Compensation Statute of Texas (1947), Article 8306, Sections 20(n) and 26(a) 2, 4

Cases

Abernathy v. Sisters of St. Mary's, 447 S.W.2d 599 (Mo. 1969) 22

Beckert v. Holley, 104 F.2d 1010, cert. denied, 60 St. Ct. 816 12

Brown v. Howard, 289 S.W.2d 752 (Tex. Civ. App., San Antonio, 1955, writ ref'd N.R.E.) 20

Commissioner v. Estate of Bosch, 387 U.S. 456, 465, 87 S. Ct. 1776, 1782-3, 18 L. Ed. 2d 886, 894 (1967) 23

Consolidated Casualty Insurance Company v. Perkins, Supreme Court of Texas, 1955, 279 S.W.2d 299, 302 ..... 11, 12

Cruz v. Ansul Chemical Co., 399 S.W.2d 944 (Tex. Civ. App. Corpus Christi, 1966, writ ref'd N.R.E.) 20

Darling v. Charleston Community Memorial Hospital, 33 Ill. 2d 326, 211 N.E.2d 253 (1965), cert. denied 383 U.S. 946, 86 S. Ct. 1204, 16 L. Ed. 2d 209 (1966) 22

Duke v. Sun Oil Co., (5th Cir. 1963) 320 F.2d 853 17

Falls County v. Mires, Ct. Civ. App. Tex. 1949, 218 S.W.2d 491, err. ref. 11, 12

	Page
Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962)	22
Houston and T.C.R. Company v. Johnson, Tex. Comm. App. 1931, 41 S.W.2d 14	11, 12
Howle v. Camp Amon Carter (Tex. 1971) 470 S.W.2d 629	3, 21, 22
Indemnity Insurance Company of North America v. Williams, Ct. Civ. App. 1934, 69 S.W.2d 519, 528	11, 12
Kasch v. Anton, Tex. Ct. Civ. App. 1935, 81 S.W.2d 1097, 1100	12
McGrath v. Wallace Murray Corporation, U.S. Ct. App. 10th Cir. 1974, C.C.H. Products Liability Reports, Page 12,823, Para. 7169 (5-15-74)	18
McKisson v. Sales Affiliates, Inc. (1967) 416 S.W.2d 787	3, 20
Meacham v. Holley, 103 F.2d 967	12
Myers v. Drozda, 180 Neb. 183, 141 N.W.2d 852 (1956)	22
Palmiero v. Spada Distributing Co. (9th Cir. 1954) 217 F.2d 561	12
Pittsburg Coca-Cola Bottling Works v. Ponder (Tex. 1969) 443 S.W.2d 546, 548	3, 20
Roginsky v. Richardson-Merrill, Inc., 378 F.2d 832, 851 (2nd. Cir. 1967)	23
Scott v. Isbrandsten Company (4th Cir. 1964), 327 F.2d 113, 119	17
Spanel v. Moundsview School District, 264 Minn. 279, 118 N.W.2d 795 (1962)	22
Stafford Manufacturing Company v. Wichita School Supply Company, et al (1930), 23 S.W.2d 695, 697	11
Theon v. Hatton, 287 Minn. 545, 177 N.W.2d 815 (1970)	22
United States v. International Minerals and Chemical Corporation, 402 U.S. 558, 29 L. Ed. 2d 178, 91 S. Ct. 1697	11
Watkins v. Southerest Baptist Church, 399 S.W.2d 530, 535	21, 22

Miscellaneous

Constitution of the State of Texas, Article I, Section 16	3, 23
Constitution of the United States, Article I, Para. 9	2
Federal Rules of Civil Procedure, Rule 49a	14, 15
Restatement of Torts 2d, Section 402A	19
Tex. Jur. 2d Vol. 62, Para. 107, Page 682	10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. .....

FIBREBOARD PAPER PRODUCTS CORPORATION, ET AL,
Petitioners,

v.

CLARENCE BOREL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners, Fiberboard Corporation, Johns-Manville Products Corporation, Armstrong Cork Company, Philip Carey Corporation, Ruberoid Company, and Pittsburgh Corning Corporation, respectfully pray for a Writ of Certiorari issue to review the Judgment and Opinion of United States Court of Appeals for the Fifth Circuit entered in this proceeding on September 10, 1973, and the Opinion on Motion for Rehearing entered on May 13, 1974.

OPINION BELOW

The original Opinion of the Court of Appeals is reported in 493 F.2d 1076, and the Opinion on Motion for Rehearing En Banc, not yet reported, appears in the Appendix hereto. No Opinion was rendered by the District Court for the Eastern District of Texas.

JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit was entered on September 10, 1973. A timely Motion for Rehearing En Banc was denied on May 13, 1974, with a written Opinion, and this Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C.A. § 1254(1).

QUESTIONS PRESENTED

1. Whether Borel, an asbestos insulator, a resident of the State of Texas, and his employer must take judicial notice of the Workmen's Compensation Statute of Texas (1947), Article 8306, Section 20(n), Revised Civil Statutes of Texas, specifying "asbestosis" as an occupational disease, and Article 8306, Section 26(a) defining "asbestosis" as the characteristic condition of the lungs caused by the inhalation of asbestos, and whether such judicial notice, plus the undisputed knowledge of Borel that he was working with a product containing some asbestos and that the dust was causing him some harm, is sufficient as a matter of law to show notice and knowledge of Borel of the danger of "asbestosis" from exposure to asbestos dust from Petitioners' product.

2. Whether the failure to submit an interrogatory or a form of verdict whereby the jury could pass upon the defendants' defense of "assumption of risk" deprived the defendants of their right to a trial by jury as guaranteed by the *Constitution of the United States*.

3. Defendants contend that this case was submitted on special interrogatories and not on a combination of special interrogatories and a general verdict. Therefore, the opinion fails to follow rule 49(a) that no finding may be made by the court on an omitted fact issue. The opinion is there-

fore in conflict with the decision of other opinions of the Fifth Circuit and an opinion of the Fourth Circuit Court of Appeals.

4. Whether the trial court erred in refusing to instruct the jury that liability could not be imposed if the utility of the product outweighed the danger involved, and thereby deprived defendants of a trial by jury on this issue. (App. p. 188 — Request No. 18).

5. The ex post facto application of strict liability in tort under Section 402A, Restatement of Torts, 2nd. Ed., (adopted in 1965), and adopted by Texas Courts in 1967, to occupational exposures to products containing asbestos by Borel commencing in 1937, is in conflict with opinions of the Supreme Court of Texas in *McKisson* v. *Sales Affiliates, Inc.* (1967) 416 S.W.2d 787, and *Houle* v. *Camp Amon Carter* (Tex. 1971) 470 S.W.2d 629, and *Pittsburg Coca-Cola Bottling Works* v. *Ponder*, 443 S.W.2d 546, 548 (Tex. 1969), and is in violation of the *Constitution of the State of Texas*, Article I, Section 16.

> "Sec. 16. No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made." Vernon's Texas Constitution, Volume 1, Page 371.

STATUTORY PROVISIONS INVOLVED

Article 8306, Sec. 20, Revised Civil Statutes of Texas. "Injury" and "personal injury" defined; occupational diseases, what are:

> "Sec. 20. Whenever the term 'injury' or 'personal injury' are used in the Workmen's Compensation Law of this State, such terms shall be construed to mean damage or harm to the physical structure of the body and such diseases or infection as naturally result

therefrom. Unless from the content the meaning is clearly to the contrary, such terms shall also be construed to mean and include *occupational diseases*, as hereinafter defined. The following diseases only shall be deemed to be occupational diseases:

"(n) Asbestosis."

Article 8306, Sec. 26, Revised Civil Statutes of Texas. Silicosis and Asbestosis.

"Sec. 26(a) Whenever used in this section 'asbestosis' shall mean the characteristic fibrotic condition of the lungs caused by the inhalation of asbestos dust." Acts 1947, 50th Leg., Page 176, Chap. 113, Para. 2, as amended Acts 54th Leg., Page 662, Chap. 233, Para. 1.

STATEMENT OF THE CASE

This is a products liability suit for damages instituted by Borel, an industrial insulator, in which his surviving wife was substituted as plaintiff, which went to trial against six manufacturers of insulation products containing some asbestos. Borel and his widow claimed that Borel developed the occupational disease of asbestosis during his 33 years as an insulator, beginning in 1936 and ending January 18, 1969. The Petitioners are manufacturers of the major portion of insulation products containing asbestos in the United States, and Borel claimed he was exposed to each defendants' product. Trial was to a jury, resulting in a verdict on "strict liability." The Fifth Circuit affirmed judgment for plaintiff, and overruled Petitioners' Motion for Rehearing.

Asbestos containing insulation was the only product available for high temperature insulation of piping and valves in ships, chemical plants, oil refineries, etc., in World War II up to 1971.

In 1947, the State of Texas amended the Workmen's Compensation Law, specifically naming the disease of

"asbestosis" as an occupational disease and defining asbestosis as the characteristic condition of the lungs caused by the inhalation of asbestos.

Each of the six remaining defendants have been held liable because of failure to give adequate notice of the danger of the occupational disease of asbestosis from exposure to their various products which contained some asbestos, such exposures being to various products over the period of 33 years up through 1969.

Borel had lung congestion for a period of five to ten years preceding his serious illness. A doctor advised him in 1964 upon X-ray examination that his lungs were cloudy and this was due to his occupation. (R. 1460). He had experienced shortness of breath from time to time, and in 1964 his doctor advised him to avoid breathing the asbestos dust. Borel knew he was working with asbestos products; he knew the dust was bad and had discussed the danger in such dust in union meetings (R. 1476-77); and he was aware of the dust problem from the time he began working as an insulator in 1936. Borel denied he was ever made aware of a specific risk of asbestosis or that he knew asbestosis was an occupational disease. Borel: "I knew I was working with insulation. Q. Did you know it contained asbestos, A Yes, sir, but I didn't know what asbestos was."

It takes a worker 20 to 25 years at a minimum to develop asbestosis, as it has a latency period of 20 years or longer. (R. 935).

There is no question but that the manufacturers knew of the disease of asbestosis from exposures in asbestos textile factories and factories where one hundred percent concentrations of asbestos wer processed, but the exposures of the industrial insulation worker presented an entirely different situation which was not comparable.

The first large scale survey of insulation workers was undertaken in the United States by Fleischer-Drinker, et al, in 1945.[1] The authors examined insulation workers in eastern Navy shipyards and concluded that "asbestos covering of naval vessels is a relatively safe operation." In 1947, the American Conference of Governmental Industrial Hygienists, a quasi-official body responsible for making recommendations concerning industrial exposures to dust from various products, recommended that the threshold limit value should be five million parts per cubic foot of air.[2] The Conference later determined in 1968 that the threshold limit value should be reduced to two million.

Research by Fleischer and Drinker in naval shipyards in 1946 (R. 1097), and Marr in naval shipyards in 1964 (R. 1099), revealed that dust exposure to insulation workers in naval ship construction was under the threshold limit value of five million and this was confirmed by the research of Balzer and Cooper (1965-1968), published in 1968 (R. 1095-1096-1097), researching working conditions of insulation workers on the Pacific Coast. Fleischer and Drinker, in 1946, and Marr, in 1964, published their con-

---

[1] Fleischer, Viles, Gade and Drinker, A Health Survey of Pipe-Covering Operations in Constructing Naval Vessels, 28 J. Indust. Hyg. 9-16.

[2] See Documentation of the Threshold Limit Values for Substances in Workroom Air, A.C.G.I.H. (3ed 1971). The A.C.G.I.H. has described the threshold limit values as "conditions under which it is believed that nearly all workers may be repeatedly exposed, day after day, without adverse effect. The values listed refer to time-weighted average concentrations for a normal workday. The amount by which these figures may be exceeded for short periods without injury to health depends upon a number of factors such as the nature of the contaminant, whether very high concentrations even for short periods produce acute poisoning, whether the effects are cumulative, the frequency with which high concentrations occur, and the duration of such periods." See Threshold Limit Values for 1961, A.C.G.I.H. (1961).

clusion that it was reasonably safe for asbestos workers to work in naval shipyards.

In testifying before a House Committee, Dr. Irving J. Selikoff, of New York City's Mount Sinai Hospital, one of the leading medical researchers, stated in 1968 that the duty and responsibility is primarily that of the government and the scientists in cooperation to solve the problem. He made it clear that it was an unhappy reflection on the health authorities — government, public health authorities, the medical profession — that at this time, in the United States in the 1960's, 7% of all deaths among insulation workers are due to a completely preventable cause, pulmonary asbestosis. He goes on to say — and this was at a time when there was no thought of imposing liability on manufacturers of asbestos products and therefore without any reason for bias — that "it is evident that they had every right to look to their government and public health authorities and to the physicians and the scientists."

Such information as we now have," he goes on to say, "are measures to improve working conditions including the following: (1) *Improved working practices;* (2) Availability of *improved masks* or respirators; (3) Appropriate exhaust; (4) Appropriate health examinations and the vacuuming of clothes before going home; and (5) The substitution of less dusty materials when the job to be done permits it. In view of the variety of things that can be done to lessen the environmental hazards, it is inaccurate to blame any segment of the industry. No one really knows where the responsibility lies or what is economically or scientifically feasible. Does it belong with the materials maker? The individual employer? The regional employers' association? The National Employers' Association? The national materials manufacturers association? The local

unions? The international union? Only the Public Health Service can provide the long time surveillance necessary for the detection of effects with a *long latent period*." See Selikoff Statement Before House Committee, supra.[3]

It was not until Dr. Selikoff published his articles beginning in 1964 regarding the occurrence of asbestosis among insulation workers in the United States that scientists and researchers became aware that exposure to dust containing asbestos particles *which were within the recognized threshold limit* was probably producing injury to the insulation worker. Working conditions for insulation workers vary greatly. Tearing out old insulation in close quarters in ships and buildings produces greater exposure to asbestos dust. There is greater exposure in dust concentration in shops and there is less exposure when pipe insulation or block insulation is applied in open areas.

The Fifth Circuit in its original Opinion states: "This product liability case involves the scope of an asbestos manufacturer's duty to warn industrial insulation workers of the dangers associated with the use of asbestos." The jury found that the defendants breached a warranty by failing to warn Borel of the danger to which he was exposed in a product containing some asbestos. The Court further holds that the defendants' product was unreasonably dangerous because of the failure to give adequate warning of the known or knowable dangers involved. (Opinion, p. 17).

The Fifth Circuit further said: "In reaching our decision in the case at bar, we recognize that the question of the ap-

---

[3] Hearings Before the Select Subcommittee on Labor of the Committee on Education and Labor, House of Representatives, Ninetieth Congress, Second Session, on H. R. 14816, Occupational Safety and Health Act, March 7, 1968, Pages 349 through 369.

plicability of Section 402A of the *Restatement* to cases involving 'occupational diseases' is one of first impression. But though the application is novel, the underlying principle is ancient. Under the law of torts, a person has long been liable for the foreseeable harm caused by his own negligence." (Opinion, p. 54).

The plaintiff here did not recover upon the theory of negligence because of a finding of contributory negligence. (R. 1804). Plaintiff's recovery was based on "strict liability."

The Court further held that by 1964-66, Borel's illness was irreversible, but it nevertheless held Fibreboard, Armstrong Cork Co. and Pittsburgh Corning liable on the basis of exposures subsequent to such dates.

The trial court rendered judgment jointly and severally against the six manufacturers remaining on the theory of "strict Liability" under Sec. 402A, Restatement of Torts, and breach of an implied warranty of fitness because the products were unreasonably dangerous because they contained some asbestos, and *defendant failed to warn of the dangers of asbestosis.* The Court of Appeals affirmed on the same theory, holding that although as found by the jury, Borel knew he was working with asbestos containing products, that it was causing him harm, nevertheless, there was a duty to warn of the potential dangers of asbestosis.

On rehearing, the Court in an eleven page Opinion, overruled the Motion for Rehearing En Banc on May 13, 1974. (App. p. 50).

IMPORTANCE OF THE QUESTION

The consideration of this case by the Supreme Court is important in that there are presently nine (9) similar cases in the United States District Court for the Eastern District

of Texas, Beaumont Division; one (1) pending in the United States District Court for the Southern District of Texas, Houston Division; and nineteen (19) cases in various other United States District Courts in Colorado, Missouri, etc. (App. p. 94). There are at least 20,000 or more industrial workers who have been exposed to asbestos dust and who are potential claimants.

REASONS FOR GRANTING THE WRIT

1. The decision below holding that Borel did not have notice of the disease and danger of asbestosis is in conflict with the decisions of the Texas Supreme Court and intermediate Texas courts, the Fifth Circuit and other Circuits, and the holding of the Supreme Court of the United States, which in effect hold that Borel and his employers had notice as a matter of law of the disease and danger of asbestosis because Borel and his employers are conclusively presumed to know that the provisions of the Workmen's Compensation Statute of Texas, 8063, Sec. 20(n) and Sec. 26(a), specifying "asbestosis" as an occupational disease and defining "asbestosis" as: "xxx the characteristic fibrotic condition of the lungs caused by the inhalation of asbestos dust."

In Texas law, it is recognized that ordinarily the diseases named as *occupational diseases are those acquired in the usual and ordinary course of an employment and those that from common expirence are recognized to be incidental to a particular employment*. xxx Tex. Jur. 2d Vol. 62, Para. 107, Page 682.

Borel was an asbestos insulator, he was a member of the Asbestos Workers Union, and at all times knew he was working with insulation products which contained some asbestos.

The Fifth Circuit holds that no notice of the danger of asbestosis from exposures to Petitioners' various products was given until 1964 and 1966, and such notices were inadequate. If Borel had notice or been given notice of the danger of asbestosis, there would be no liability under Texas law or under the Restatement of Torts, even though the product was "unreasonably dangerous" or an unavoidable unsafe product. Petitioners assert that as a matter of law Borel had notice and knowledge of the provisions of the Texas Workmen's Compensation Law; therefore, he had notice and knowledge of the occupational disease of asbestosis and its cause.

"Judicial notice" is cognizance of certain facts which judges and jurors may properly take and act on without proof because they already know them. *United States* v. *International Minerals and Chemical Corporation*, 402 U.S. 558, 29 L. Ed. 2d 178, 91 S. Ct. 1697.

Judicial notice is taken of the provisions of the Texas Workmen's Compensation Statute. All persons are conclusively presumed to know the law.[4]

The Supreme Court of Texas in *Stafford Manufacturing Company* v. *Wichita School Supply Company, et al* (1930),

---

[4] Stafford Manufacturing Company v. Wichita School Supply Company, Comm. App. Tex., Opinion adopted by Sup. Ct. Tex., 23 S.W.2d 695, 697; Indemnity Insurance Company of North America v. Williams, Tex. Ct. Civ. App. 1934, 69 S.W.2d 519, 528; Consolidated Casualty Insurance Company v. Perkins, Sup. Ct. Tex. 1955, 279 S.W.2d 299, 302; Texas Employers Insurance Company v. Doss, Tex. Ct. Civ. App. 1957, 301 S.W.2d 473, err. ref. n.r.e.; Falls County v. Mires, Ct. Civ. App. Tex. 1949, 219 S.W.2d 491, err. ref. by Sup. Ct.; Kasch v. Anton, Tex. Ct. Civ. App. 1935, 81 S.W.2d 1097, 1100; Houston & T.C.R. Company v. Johnson, Tex. Comm. App. 1931, 41 S.W.2d 14; 23 Tex. Jur. 2d, Para. 73, Page 114.

23 S.W.2d, 695, 697, said: "The rule is too elementary to require the citation of authority that all persons are conclusively presumed to know the law."

In *Kasch* v. *Anton*, Tex. Ct. Civ. App., 1935, 81 S.W.2d 1097, 1100, the Court held: "However violent the presumption may be that every man knows the law, *it nevertheless conclusively prevails*. Such presumption applied as much to Flores or Anton, as it did to Kasch; *and it would be a strange doctrine of negligence to hold that Kasch was negligent in failing to tell Flores something* that he is in law conclusively presumed to know." The claim in the case was that Kasch was negligent in failing to instruct his servant, Flores, of the provisions of the law of the road.

In *Indemnity Insurance Company of North America* v. *Williams*, Ct. Civ. App. 1934, 69 S.W.2d 519, 528, the Court said: "Courts take judicial notice of public laws of the state and all facts therein recited."

In *Consolidated Casualty Insurance Company* v. *Perkins*, Supreme Court of Texas, 1955, 279 S.W.2d 299, 302, the Court was construing provisions of the Texas Workmen's Compensation Act, and said: "The respondent is presumed to know the law."

In *Houston and T.C.R. Company* v. *Johnson*, Tex. Comm. App. 1931, 41 S.W.2d 14, the Court said: "Johnson was charged with knowledge of the statutory provisions and of their legal effect." (The statute referred to freight charges)

In *Falls County* v. *Mires*, Ct. Civ. App., Tex. 1949, 218 S.W. 2d 491, err. ref., which means the opinion is approved by the Supreme Court, it is stated: "Everyone is chargeable with knowledge of statutory provisions of the law."

The Fifth Circuit case of *Meacham* v. *Holley*, 103 F. 2d 967, and *Beckert* v. *Holley*, 104 F. 2d 1010, cert. denied, 60

S. Ct. 816, held: "All persons are conclusively presumed to know the law."

In our case, Borel knew he was working with products which contained asbestos.[5] (Op., p. 3).

Petitioners assert that as a matter of law Borel had notice of the provisions of the Texas Workmen's Compensation Act which gave him notice of the occupational disease of asbestosis, and the knowledge that "asbestosis" means the characteristic fibrotic condition of the lungs caused by the inhalation of asbestos dust. Therefore, Borel had notice of the danger of asbestosis from exposure to asbestos dust as far back as 1947 when the Texas Statute was enacted. The Fifth Circuit discarded this contention, and held that the manufacturers owed each individual worker the duty to warn of the possible disease of asbestosis from such exposures to dust from its product.

Clearly, there is a conflict between the Opinion of the Fifth Circuit in this case, and the Texas cases by which the Court is "Erie bound."

---

[5] "Borel said he had known for years that inhaling asbestos dust 'was bad for me' and that it was vexatious and bothersome, but he never realized it could cause any serious or terminal illness. xxx." He was a member of the Asbestos Workers Union. He testified he knew it was dangerous but he never knew how dangerous.

"Q. In other words, there was some question in your mind as to whether this was dangerous and whether it was bad for your health?

A. There was always a question, you just never know how dangerous it was. I never did know really. If I had known I would have gotten out of it.

Q. All right, then you did know it had some degree of danger but you didn't know how dangerous it was?

A. I knew I was working with insulation.

Q. Did you know that it contained asbestos?

A. Yes, sir, but I didn't know what asbestos was."

2. Whether the failure to submit an interrogatory or a form of verdict whereby the jury could pass upon the defendants' defense of "assumption of risk" deprived the defendants of their right to a trial by jury as guaranteed by the Constitution of the United States.

3. Defendants contend that this case was submitted on special interrogatories and not on a combination of special interrogatories and a general verdict. Therefore, the opinion fails to follow rule 49(a) that no finding may be made by the court on an omitted fact issue. The opinion is therefore in conflict with the decision of other opinions of the Fifth Circuit and an opinion of the Fourth Circuit Court of Appeals.

In this case, pursuant to Rule 49a, F.R.C.P., the Court requires the jury to return ONLY a special verdict in the form of answers to special written interrogatories. This is unequivocally established by the verdict of the jury, which consisted solely and alone of answers to five special interrogatories. The interrogatories and answers which constituted the verdict are shown on Pages 292-293 of the Appendix submitted with this application.

Special Interrogatory No. 1 inquired as to negligence on the part of each defendant proximately causing the injuries and death of the deceased. Special Interrogatory No. 2 submitted as to each defendant the question of gross negligence. Special Interrogatory No. 3 inquired as to whether the deceased was guilty of contributory negligence proximately causing his injuries and death, which was answered "Yes." Special Interrogatory No. 4 submitted the question of whether the defendant breached their warranties proximately causing the death, which were answered in the affirmative. Special Interrogatory No. 5 inquired as to what sum of money would reasonably compensate the

plaintiff for the damages sustained by reason of the death of her husband. At the conclusion of the interrogatories is found the following:

"VERDICT OF THE JURY

"We, the jury, return the above answers to the special interrogatories propounded to us herein as our verdict in this case.

9/29/71 s/ Roy L. Jenkins
FOREMAN OF THE JURY"

While the Court generally instructed the jury as to the defense of voluntary assumption of risk, it is thus evident that THERE WAS NO WAY for a jury by their verdict to determine this defense. There was no general form of verdict submitted to the jury and they returned none. The Fifth Circuit stated: "The trial court submitted this case to the jury on special interrogatories, not 'on general verdicts accompanied by special interrogatories as to Borel's contributory negligence,' as stated in the original opinion and as stated by defendants' counsel in objecting to certain portions of the jury trial." (Op. Reh. 3828), App. p. 60.

Rule 49(a), F.R.C.P., provides for the submission of a case to the jury on a special verdict such as was here done, and further, "If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury on the issue so omitted, unless before the jury retires he demands its submission to the jury." Here the defendants in strict and full compliance with the rule filed a requested interrogatory submitting the defense, which was presented to the Court and overruled by the Court, copy of which is shown in the

Appendix, Page 161. Going even further, defendants submitted and called to the Court's attention their Requested Charge No. 11, Appendix, Page 197, setting forth the elements of the defense, which the Court refused, and finally defendants objected to the charge ". . . because there was no interrogatory submitted to the jury whereby they might answer and find in favor of the defendants based upon that defense (voluntary assumption of risk), and even though the jury may find and believe that all of the elements were established, there is still no way under the form of verdict as submitted to the jury whereby they could return a finding in favor of the defendants on that theory. We have specifically called the Court's attention to, I believe it was, our Requested Charge No. 11, which set out elements of that defense and would request the Court 'TO GIVE THE JURY A SPECIAL INTERROGATORY SO THAT THEY COULD ANSWER AND MAKE A FINDING SPECIFICALLY ON THAT DEFENSE.'"

By way of summary, defendants did everything required by the rules, and more, to preserve their right to a jury trial on the defense of voluntary assumption of risk.

The Court of Appeals on rehearing recognized the fact that the case was submitted to the jury on special interrogatories. The appellate court then discusses the GENERAL instructions in which the trial court instructed the jury as to the elements of the defense of voluntary assumption of risk, and then overrules defendant's contentions by concluding that the general instruction was favorable to the defendants, holding as follows:

> "What more could the defendant want? We considered the instruction overly favorable to the defendants. Notwithstanding, the jury still found against

> the defendants, IN EFFECT, therefore, finding that Borel did not assume the risk."

Thus, the Court of Appeals deprived the defendants of their constitutional right to a jury trial, not because the defense was actually submitted to the jury or determined by the jury, but on the ground that because the jury answered the special interrogatories as to (1) negligence, (2) gross negligence, (3) contributory negligence, (4) breach of warranty, (5) damages, that they were "IN EFFECT," also finding against the defendants on the defense of voluntary assumption of risk, which was not mentioned or even hinted at, in the interrogatories, the answers to which alone constituted the verdict in this case. Rule 49a, F.R.C.P., recognizes the parties' rights to a trial by jury and provides that such right can be preserved as to any fact issue raised by the pleadings or evidence by demanding the submission thereof exactly as was done here.

It is settled that when a case is submitted to the jury on special interrogatories, as here, the Court should submit and allow the jury to pass upon all disputed issues of fact and that when a party, as here, objects to the failure to submit any disputed issue, that then the Court cannot make a finding thereon and a new trial must be granted in order to preserve the parties' constitutional right of trial by jury. *Scott* v. *Isbrandsten Co.* (4th Cir. 1964), 327 F.2d. 113; *Palmiero* v. *Spada Distributing Co.* (9th Cir. 1954), 217 F.2d. 561; *Duke* v. *Sun Oil Co.* (5th Cir. 1963), 320 F.2d. 853. The Court's holding here is in conflict with these cases.

4. Whether the trial court erred in refusing to instruct the jury that liability could not be imposed if the utility of the product outweighed the danger involved, and thereby deprived defendants of a trial by jury on this issue. (App. p. 188 — Request No. 18).

The Fifth Circuit said: "The defendants also contend that the trial court erred in refusing to instruct the jury that liability could not be imposed if the utility of the product outweighed the danger involved. The trial court did, however, tell the jury that liability could not be imposed unless the product was 'unreasonably dangerous,' *a concept that necessarily implies a balancing of the products utility against the danger.*"

We submit that defendants were entitled to an instruction on the defense of the "utility of the product outweighing the danger involved," and the jury could not be assumed to have the knowledge that this defense was incorporated or implied from the use of the term "unreasonably dangerous."

This holding is in conflict with the opinion in *McGrath v. Wallace Murray Corporation*, U. S. Ct. App. 10th Cir., 1974, CCH. Products Liability Reports, Pg. 12,823, Para. 7169 (5-15-74), and cases therein cited holding that the failure to submit a principal defense theory in the instructions is reversible error. The defense was failure of plaintiff to use a guard while using the abrasive wheel as a defense to strict liability.

The defence of the utility of the products containing some asbestos outweighing the danger was an important one which the jury was not allowed to consider.

5. The ex post facto application of strict liability in tort under Section 402A, Restatement of Torts, 2nd. Ed., (adopted in 1965), and adopted by Texas Courts in 1967, to occupational exposures to products containing asbestos by Borel commencing in 1936, is in conflict with opinions of the Supreme Court of Texas in McKisson v. Sales Affiliates, Inc. (1967) 416 S.W. 2d 787, and Howle v. Camp Amon Carter (Tex. 1971), 470 S.W. 2d 629, and Pittsburgh Coca-Cola Bottling Works v. Ponder, 433 S.W. 2d 546, 548 (Tex. 1969), and is in violation of the Constitution of the State of Texas, Article I, Section 16.

Borel commenced work as an asbestos insulation worker in 1936 in shipyards, performing original and repair work in holds of vessels built by contractors for the United States Government. Borel worked in such shipyards over a period of three or four years, working in close quarters and inhaling large amounts of asbestos dust. The record is silent as to the names of the manufacturers of the asbestos insulating materials utilized in shipbuilding during the war years. Thereafter, Borel worked for numerous independent insulation contractors in which products of one or more of Petitioners were used from time to time, until the institution of the instant suit.

The State of Texas had in full force and effect from 1947 to the present time an occupational disease statute under workmen's compensation providing for benefits caused by asbestosis contracted on the job; nevertheless, the Fifth Circuit held Petitioners, who were manufacturers of insulation products and had no control over working conditions of Borel and workers similarly employed, strictly liable in tort under Section 402A of the Restatement of the Law of Torts (2nd Ed.) which was not adopted by Restatement until 1965, and which rule of strict liability was not

adopted in the State of Texas until 1967 as to products other than food. *McKisson* v. *Sales Affiliates, Inc.*, 416 S.W. 2d 787 (Tex. 1967). No Texas Court has held the doctrine enunciated in *McKisson* v. *Sales Affiliates, Inc.*, supra, retroactively applicable to events and acts occurring before the date of the decision of the Texas Supreme Court in June, 1967.

Prior to the *McKisson* case, the Texas Supreme Court expressly refused to extend the doctrine of strict liability to manufacturers of non-food products. *Cruz* v. *Ansul Chemical Company*, 399 S.W. 2d 944 (Tex. Civ. App. — Corpus Christi 1966, writ ref'd n.r.e.); *Brown* v. *Howard*, 289 S.W. 2d 752 (Tex. Civ. App. — San Antonio 1955, writ ref'd n.r.e.).

In 1967, the Supreme Court of Texas abruptly changed the direction of the law in Texas when it adopted the rule of strict liability in the *McKisson* case, supra. In *Pittsburg Coca-Cola Bottling Works* v. *Ponder*, 443 S.W. 2d 546, 548 (Tex. 1969), the Court gives a condensed history of the evolution of this phase of the law when it said:

> "Our approach to use of the rule for imposing liability on sellers of products has been gradualistic and marked with caution. Some twenty-seven years ago, we adopted the rule as a means of fixing liability on manufacturers and packagers of food products for human consumption. Decker & Sons v. Capps, 139 Tex. 609, 164 S.W. 2d 828, 142 A.L.R. 1479 (1942), and on retain purveyors thereof, Griggs Canning Co. v. Josey, 139 Tex. 623, 164 S.W. 2d 835, 142 A.L.R. 1424 (1942); but a decade later, we questioned the wisdom of applying the rule to retailers of food products, canned or packaged by others, and we refused to apply it to wholesalers of such products. Bowman Biscuit Co. of Texas v. Hines, 151 Tex. 370, 251 S.W. 2d 153 (1952). Then, in 1956, with the question squarely presented,

we refused to grant a writ in Brown v. Howard, 285 S.W. 2d 752 (Tex. Civ. App. — San Antonio, 1956, writ ref'd n.r.e.), and thus refused to apply the rule to a manufacturer of a spray causing harm when used on the plaintiff's cattle.

"In 1967, we finally yielded to the irrefutable logic that the rule of strict liability is the only practical vehicle for protecting the public against harm so often encountered by innocent users and consumers of defective products. *We abruptly changed direction.* In McKisson v. Sales Affiliates, Inc., 416 S.W. 2d 787 (Tex. Sup. 1967), we applied the rule against a distributor of a permanent wave lotion which proved harmful when applied to a woman's hair and scalp. In that case, we committed the court to the rule of strict liability expressed in Section 402A of The American Law Institute's Restatement of the Law of Torts (2d Ed.) as applicable to all persons engaged in the business of selling who sell a product in a defective condition which renders it unreasonably dangerous to a user or consumer or to his property. *The necessary effect of McKisson was to disapprove prior contrary expressions of the law* as announced in Bowman Biscuit Co. v. Hines, supra, and Brown v. Howard, supra." (Emphasis added).

In *McKisson*, supra, the strict liability doctrine was applied to the parties before the Court, but the Court did not determine whether the new rule it adopted would operate retroactively or only prospectively as to other cases.

The Texas Supreme Court recently recognized that probable reliance by potential defendants warranted prospective application of the court-made rule abolishing charitable immunity rather than giving retroactive effect to such opinion. *Watkins* v. *Southcrest Baptist Church*, 399 S.W. 2d 530 (Tex. 1966), *Howle* v. *Camp Amon Carter*, 470 S.W. 2d 629, 1971.

In *Watkins* v. *Southcrest Baptist Church*, 399 S.W.2d 530, 535, the Supreme Court of Texas sustained the court-made rule of charitable immunity but gave notice that from and after the date of the opinion "that the doctrine of charitable immunity will not be recognized in cases hereafter arising."

In *Hoard* v. *Camp Amon Carter*, 470 S.W.2d. 629 (1971), the Texas Supreme Court in a case involving the charitable immunity doctrine, said:

> "The several opinions in *Watkins* gave ample notice that the doctrine of charitable immunity would be reconsidered and might well be abrogated. It is now completely abrogated with respect to causes of action arising from events *occurring after* the motion for rehearing in *Watkins* was overruled on March 9, 1966."

Thus, the Supreme Court of Texas recognized the probable reliance by potential defendants of the defence of charitable immunity and in abolishing the court-made doctrine made its ruling applicable prospectively. Numerous other Courts follow the prospective application of court-made law.[6]

It is submitted that the Federal Courts should ascertain and follow the position that the Texas Supreme Court would

---

[6] Abernathy v. Sisters of St. Mary's, 447 S.W.2d 599 (Mo. 1969), (abolishing the doctrine of charitable immunity); Myers v. Drozda, 180 Neb. 183, 141 N.W.2d 852 (1956); Darling v. Charleston Community Memorial Hospital, 33 Ill. 2d 326, 211 N.E.2d 253 (1965) *cert. denied* 383 U.S. 946, 86 S. Ct. 1204, 16 L. Ed. 2d 209 (1966); Thoen v. Hatton, 287 Minn. 545, 177 N.W.2d 815 (1970), (overruling the rule that the wife had no cause of action for loss of husband's consortium, and holding that such decision would operate prospectively); Spanel v. Moundsview School District, 261 Minn. 279, 118 N.W.2d 795 (1962) (abolishing the doctrine of sovereign immunity for school districts prospectively); Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962), (abolishing the doctrine of governmental immunity prospectively).

probably take on the retroactive application of the rule of strict liability in tort adopted in *McKisson*. Since the Texas Supreme Court has given the condensed history of the evolution of strict liability in *Pittsburg Coca-Cola* v. *Ponder* and refused to apply the abolition of the rule of charitable immunity retroactively, it is evident that the Texas Supreme Court would not apply the rule of strict liability in tort to non-food products retroactively to 1936. The Federal Courts should attempt to decide the matter as a Texas Court would — "in effect, sitting as a State Court." *Commissioner* v. *Estate of Bosch*, 387 U. S. 456, 465, 87 S. Ct. 1776, 1782-83, 18 L. Ed. 2d 886, 894 (1967). In determining the question, the Federal Courts should take into account all the authorities which would be persuasive to the State Court. *Roginsky* v. *Richardson-Merrill, Inc.*, 378 F. 832, 851 (2nd Cir. 1967).

Another impelling reason why this rule by the Texas Supreme Court in *McKisson* in 1967 should not be applied retroactively is Article I, Section 16 of the *Texas Constitution*:

> "Sec. 16. No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made." Vernon's Texas Constitution, Volume 1, Page 371. See Commentary, Page 372.[7]

[7] "The Texas Constitution goes further than the United States Constitution for the former is not confined to forbidding ex post facto laws, i.e., retroactive and penal legislation, but it also lays a ban on any retroactive law. In prohibiting retroactive laws, the Texas Constitution seeks to safeguard rights not guaranteed by other constitutional provisions such as the impairment of the obligation of contracts and due process of law clauses. Mellinger v. City of Houston, 68 T. 37, 3 S.W. 249 (1887).

"A retroactive law is one meant to act on things that are past. As such, a statute is retroactive which takes away or impairs vested rights acquired under existing laws, or creates new obli-

Under principles governing the retroactive application of an overruled decision, it seems clear that the Texas Supreme Court, as well as the majority of jurisdictions in other States, would not hold the *McKisson* strict liability doctrine retroactively applicable, and particularly with respect to events occurring before June 7, 1967.

In summary, the opinion of the Fifth Circuit in the case at bar holds that an employee may recover from manufacturers of asbestos products for an occupational disease contracted from exposures beginning in 1936, even though up to 1967 he had no cause of action cognizable under Texas law against the manufacturers. Such decision is contrary to Texas law. Further, recovery is allowed under the strict liability in tort despite the fact that the applicable Workmen's Compensation Statutes of Texas grant a remedy for becoming incapacitated as a result of the occupational disease.

---

gations, imposes new duties, or adopts a new disability in respect to transactions or considerations already past, and which affects acts or rights accruing before it came into force. Turbeville v. Gowdy, Civ. App. 272 S.W. 559 (1925)."

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted;

GEORGE A. WELLER
P. O. Box 350
Beaumont, Texas 77704

Attorney for Petitioner, Fibreboard Corporation

JOHN G. TUCKER
Beaumont Savings Building
Beaumont, Texas 77701

Attorney for Petitioner, Ruberoid Company

JOHN G. TUCKER
GORDON R. PATE
JOHN PIKE POWERS IV
San Jacinto Building
Beaumont, Texas 77701

Attorneys for Petitioner, Johns-Manville Products Corporation

GEORGE E. DUNCAN
Petroleum Building
Beaumont, Texas 77701

Attorney for Petitioner, Pittsburgh Corning Corporation

W. N. Arnold, Jr.
Bank of the Southwest
Building
Houston, Texas 77002

Attorney for Petitioners,
Armstrong Cork Company and
Philip Carey Corporation

John G. Tucker

and

George A. Weller

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

No. .....

FIBREBOARD PAPER PRODUCTS CORPORATION, ET AL.,
Petitioners,

v.

CLARENCE BOREL,
Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of July, 1974, three copies of the Petition for Writ of Certiorari were mailed by Certified Mail, postage prepaid, to the Honorable Marlin Thompson, Stephenson & Thompson, Attorneys, Stephenson Building, Orange, Texas, 77630, counsel for Respondent, and three (3) copies were mailed by Certified Mail, postage prepaid, to the Honorable George E. Murphy, San Jacinto Building, Beaumont, Texas, counsel for Intervenor. I further certify that all parties required to be served have been served.

GEO. A. WELLER
P. O. Box 350
Beaumont, Texas 77704
Counsel for Petitioners